IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4374 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES YES

2. To be referred to the Reporter or not? YES :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO NO

5. Whether it is to be circulated to the Civil Judge? : NO NO

BISMILLAHKHAN S PATHAN

Versus

DHANIBEN SUKLAL KHARVA

Appearance:

MR KJ SHETHNA for Petitioner

NOTICE SERVED for Respondent No. 1

MR ST MEHTA APP for Respondent No. 2

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 28/04/2000

C.A.V. JUDGEMENT

1. This application arises from taking of cognizance of the offences under Sections 302 and 307 of the Indian Penal Code and dismissal of the Criminal Revision Application No.92 of 1986 of the petitioner as a result of which the order to take cognizance of the offences and

the order to issue non-bailable warrant for arrest of the petitioner, a Police Sub Inspector, is confirmed.

2. On 6.4.1985, a complaint of one Smt. Dhaniben S. Kharva is filed against the present petitioner and unnamed policemen. According to the complaint, on 24.3.1985, while the husband and the elder son of the complainant were out of station, in wee hours of the night at around 1.30, the doors of her house were heavily knocked and shouts and words of abuse were heard. Her daughter, aged 14, opened the door and asked the younger son to remain in the bed. The complainant followed the daughter and saw that a tall fair-skinned person in police dress was standing out along with other people. He was told by the daughter that her father and brother were not at home and asked as to who could have caused trouble. This was in reply to the earlier shouts to the effect that they were hiding in the house after rioting. As the police officer was shouting words of abuse, he was requested by the daughter not to do so and there was some oral altercations between the two. Eventually, the daughter was injured and the complainant as well as other people who were gathered around started crying to save the girl. But the officer's ire grew and he ordered his fellow policemen, who were rushing towards the crowd, to fire bullets and to kill the complainant mother and the daughter. Thus, three rounds were fired out of which two bullets injured the daughter and one injured the complainant. Both the victims fell on the ground even as the crowd dispersed and the police left the scene. After about two hours of the incident, the victims were carried to the hospital in a police van and an operation was performed upon the daughter at around 3.30 in the early morning but she died at 5.55. Till then, she was

conscious. An operation was also performed on the complainant and a bullet was extracted from her body. No one came to take their statements. A few acquaintances of the victims were present at the scene of the firing and one of the witnesses told the complainant afterwards that the fair skinned tall police officer who ordered firing was Police Sub Inspector Pathan. It is categorically stated in the complaint that both the accused can be identified if they are shown to her. Upon filing the complaint on these facts, after being released from the hospital, the complainant has been examined on oath and an order under Section 202 (1) of the Cr.P.C. was made to examine the witnesses on oath. Thereafter, an order to take cognizance of the offences and issue a bailable warrant against the accused was made and the same was challenged before the learned Sessions Judge in

Criminal Revision Application No.118 of 1985. The said Revision Application was allowed and the case was remanded. Accordingly, more witnesses were examined and after considering the facts on record and the legal position on the subject, by the order dated 7.8.1986, a warrant to arrest the petitioner for the offences punishable under Sections 302 and 307 was issued in Criminal Case No.5815 of 1985.

3. The aforesaid order taking cognizance of the offence and ordering issuance of non-bailable warrant of arrest was challenged by the petitioner in Criminal Revision Application No.92 of 1986. It was contended before the learned Additional Sessions Judge that, according to the order in the earlier revision application, the trial Magistrate was directed to hear the accused also and without that being done, the cognizance was taken. It was also contended that the trial Court had disregarded the provisions of Section 210 as also Section 197 (3) of the Cr.P.C. After considering the contentions of the petitioner, the learned Additional Sessions Judge came to the conclusions that the accused had no right to be heard and had absolutely no locus standi at the stage when processes were to be issued against the accused on a private complaint. The trial Magistrate was required to follow the settled legal position of law on this point. Referring to the other case arising out of the F.I.R. in Crime Register No.76 of 1985 regarding rioting and offences under Sections 147, 148, 149, 336, 436, 511 and 427 of the IPC and Section 135 of the Bombay Police Act, it was found that the major facts of that case were different and the provisions of Section 210 (1) or Section 210 (3) could not be applied. As regards the sanction required under Section 197 of the Cr.P.C., it was found that the facts alleged in the complaint did not reveal that the alleged acts of the accused were within the scope of discharge of their duty. Similarly, the provisions of Sections 127 and 128 of the Cr.P.C were held to be not attracted in the facts of the case. Thus, the revision application was dismissed with costs and the order passed by the learned Chief Judicial Magistrate taking cognizance of the offences and issuing warrant for arrest was confirmed by the order dated 9.9.1992.

4. The present petition is filed with a prayer to set aside the order of the learned Chief Judicial Magistrate as also the order confirming the same in Criminal Revision Application No.92 of 1986 and to quash the complaint and the proceedings in Criminal Case No.5815 of 1985. It is contended in the petition that,

according to the prosecution itself, an unidentified person other than the petitioner was responsible for the overt act of firing the shots. That in absence of the person who is alleged to have fired the shots, direct imputation of the offence against the petitioner was patently defective and it vitiates the order of the learned Magistrate on the ground of non-application of mind. That while taking cognizance of the offence, the failure on the part of the court to bring the person who committed the overt act cannot be taken as an innocent omission. It is alleged that the facts about the incident are concocted and a case is mala fide made out and a malicious attempt is made by overcoming the bar provided in Sections 132 and 197 of the Cr.P.C.

5. During the course of arguments, learned senior counsel Mr.K.J.Shethna appearing for the petitioner has extensively referred to the FIR dated 25.3.1985 and the judgment in Sessions Case No.31/87 which arose pursuant to the aforesaid FIR. He has also referred to and relied upon the notification issued by the District Magistrate, Bharuch under Section 135 (1) of the Bombay Police Act as also the order dated 16.3.1985 issued under Section 37 (1) of the Bombay Police Act. A strenuous effort was made to show that since 17.3.1985, special provisions had had to be made for the maintenance of law and order and to control communal riots in the area. As stated in the FIR registered on 25.3.1985, at around 1.30 a.m., reports of rioting between two communities were received from the area where shots were fired. Some people were reported to be injured in the pelting of stones, breaking doors of houses and a bid to set a shop on fire. Even after the use of teargas shells, the crowd had not dispersed but the police party was attacked. The people in the crowd were warned on the loud speaker that they will be fired upon if they did not disperse. Thereafter, the Deputy Superintendent of Police, Sub-Division, Bharuch, had ordered an S.R.P. Police Constable Shri Ranchhod B.Patel to fire three rounds as a result of which a girl and a woman were injured. Upon asking the name of the persons injured by bullets, it was found that one was Dhaniben, wife of Suklal Kharva, and the girl told her name to be Naina Suklal Kharva. Several other persons from the crowd were arrested. A criminal case was registered and conducted against them in Sessions Case No.31/87. It has to be noted here that after a full-fledged trial in Sessions Case No.31/87, all the accused except accused No.29, were acquitted by the order dated 10.6.1988.

6. It is vehemently contended on behalf of the petitioner that the incident recorded as above on the

police record showed that the firing was ordered by another officer in view of the situation prevailing in the area at the relevant time. This alternative version of the events is totally inconsistent with the allegations in the complaint. The version of the complainant in the present case alleges that the shots were specifically ordered to be fired at the victims and the police officer concerned had not come to the spot with other police personnel pursuant to any riot going on at the spot of the incident. The significant fact which has to be borne in mind in the present case is that the accused person was at the relevant time a Police Sub Inspector as also the fact that no official investigation was undertaken at the relevant time by the police department. It is also significant to note that the allegations against all the accused persons except one Rustom Ismail in the Sessions Case No.31 of 1987 prosecuted by the State for the alleged acts of violence and rioting are held to have not been proved after a full-fledged trial. While the petitioner has heavily relied on the evidence led in that case, it is also revealed that the then Deputy Superintendent of Police for the area was examined as a witness in that case. In his deposition he has confirmed the presence of the present petitioner at the place and time and the alleged firing. He has also deposed that he had ordered an S.R.P. Police Constable, namely, Ranchhod B. Patel, to fire at the crowd at a level below the waist. He admitted that he cannot recognize any of the persons arrested at the time of the incident. In his cross-examination, he has stated that he had not seen any police officer running after the crowd. He also admitted that he had neither given any instruction to arrest any person from the crowd nor had he ordered the use of force (lathicharge). Thus, the version given out by the police department hardly inspires any confidence. However, on the face of this alternative version, it is vehemently contended that, while the principal offender who pulled the trigger is not before the court, the allegations against the petitioner in the complaint are too fantastic to be believed. It is also submitted that the petitioner has not been identified as the person who ordered the firing. Relying upon the provisions of Section 311, it is further submitted that the court ought to have summoned and examined other witnesses and ascertained the facts before taking cognizance of the offence and issuing process against the petitioner. Thus, in short, the learned advocate for the petitioner has mainly urged that in absence of cogent, consistent and admissible evidence at the pre-trial stage and in view of the allegations in the complaint being an afterthought and being vitiated by

mala fides, the present petition should be allowed and the impugned order should be quashed.

7. In support of his submissions, the learned counsel for the petitioner has relied upon several judgments. Relying upon the judgment of the Apex Court in CHANDRA DEO SINGH v. PRAKASH CHANDRA BOSE (AIR 1963 SC 1430), it is submitted that the petitioner could not have been precluded from being present when the enquiry was held by the Magistrate. In the facts of the present case, the decision in the earlier Revision Application No.118 of 1985 directed the trial Magistrate to hear the accused also. However, that direction was disregarded and the impugned order was made. This issue was raised in the Criminal Revision Application No.92 of 1986 also and the same has been considered by the learned Additional Sessions Judge in the impugned judgment. In the aforesaid judgment of the Hon'ble Supreme Court, it is observed as under:

> "No doubt, as stated in sub-section (1) of Section 202 itself, the object of the inquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements on oath made by the complainant and the statements made before him at the enquiry which would naturally mean the complaint and the statements made before him by the persons examined at the instance of the complainant."

It is also clarified that it is clear from the entire scheme of the relevant provisions of the Code of Criminal Procedure that an accused person does not come into picture at all till the process is issued. In view of this settled legal position, the learned Additional Sessions Judge was right in finding the submissions to be devoid of any merit.

8. Relying upon the judgment of the Hon'ble Supreme Court in MADHAVRO JIWAJI SCINDIA v. SIMBHAJIRAO CHANDROJIRAO ANGRE (AIR 1988 SC 709), it is submitted that it would not be expedient and in the interest of justice to permit prosecution of a police officer to continue as, prima facie, the case was not established but the process of the court was utilised for an oblique purpose without any chance of conviction. This submission has to be stated only to be rejected as the evidence recorded by the trial Magistrate in the enquiry has disclosed prima facie sufficient grounds to proceed

against the accused for the alleged offences.

9. The learned advocate for the petitioner has also relied upon the legal position on the subject as summarised by the Hon'ble Supreme Court in STATE OF HARYANA v. BHAJAN LAL (AIR 1992 SC 604). Sub-para 5 of para 108 of the said judgment is particularly pointed out to submit that where the allegations in the complaint are so absurd and inherently improbable that no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, the extraordinary powers of quashing should be exercised. However, in the facts of the present case, it is difficult to find any absurdity or inherent improbability on the basis of which it can be said that sufficient ground is not there for proceeding against the accused. As observed by the Hon'ble Supreme Court in CHANDRA DEO SINGH's case (supra), where there is prima facie evidence, even though the accused may have a defence that the offence is committed by some other person or persons, the matter has to be left to be decided by the appropriate forum at the appropriate stage and issue of process cannot be refused.

No other contentions are seriously urged or relied upon on behalf of the petitioner.

10. Relying upon the judgment in RAJPAL SINGH v. JAI SINGH (AIR 1970 SC 1015), it is submitted by the learned Additional Public Prosecutor that the Magistrate holding the preliminary enquiry has only to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit. It would be for the Sessions Court and not for the Magistrate to decide which of the two conflicting versions will find acceptance at its hands. If there is some evidence on which a conviction may reasonably be based, the case has to be committed. It is further submitted that the Magistrate had no power to evaluate the evidence for satisfying himself about the guilt of the accused. Thus, it is submitted that the impugned orders were required to be sustained and the petition deserves to be dismissed.

11. As observed hereinabove, sufficient grounds for proceeding against the petitioner are disclosed at the preliminary enquiry which aspect takes this case out of the category of rare cases where the proceedings can be quashed. There is no merit in the present petition and, therefore, it deserves to be dismissed. Accordingly, the Criminal Miscellaneous Application is dismissed with

costs and the interim relief granted earlier stands vacated. At the end of arguments, it was requested by the learned senior counsel for the petitioner that in case the stay against execution of the non-bailable warrant in Criminal Case No.5815 of 1985 were to be vacated, the petitioner may be permitted to directly present himself before the Sessions Court and make an application for bail. In the facts and circumstances of this case, it is ordered that the petitioner shall present himself before the Sessions Court, Bharuch on or before 05.5.2000 for further proceedings in accordance with law and till then he shall not be arrested.

(KMG Thilake)
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